Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1961

No. 948

NEDRICK YOUNG, ET AL.,

Petitioners,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, ET AL.,

Respondents.

REPLY FOR PETITIONERS

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Preliminary Statement

To avoid certiorari on the substantive issue set forth in Question 1 of Petitioners' Statement of Questions Presented (Pet. 2), respondents assert that the "undisputed facts" upon which petitioners rely consist of such things as old newspaper articles, an unissued press release, unauthenticated letters, and a transcript of a news telecast (Res. Br. 4-5). The record references set forth in the Petition (Pet. 5-11) demonstrate that, except for the press release obtained from the AMPP's files (Pet. 10), this assertion is false.

Respondents make a similar attempt to dilute the undisputed facts concerning the "employment controls" provisions of their respective distribution-financing agree-

ments (Res. Br. 5). The existence of such "controls" was expressly conceded by respondents' counsel during argument before the District Court.[1]

I

Respondents would have this Court deny certiorari on Question 1 (Pet. 2), not because it is unimportant or undeserving of consideration, but because, as respondents allege, that issue does not arise on this record (Res. Br. 7-8). We made it clear, however, that the Court of Appeals' failure to come to grips with this problem "resulted directly from the deference it paid to the District Court's 'findings'" (Pet. 16), and that, on this record, its failure to do so required review by this Court (Pet. 21-23).

If the District Court's "finding" on the issue of "concert" (No. 10, J.A. 567-568) is to be given any credence at all, it must be construed, if possible, as being consistent with the undisputed facts of record (Pet. 5-11). Otherwise, as we pointed out (Pet. 21), it would be "clearly erroneous." Construed in this light, the District Court's finding "that each defendant acted individually non-conspiratorially and

[1] Respondents' counsel stated: "[I]t is true that when a motion picture company finances an independent producer in the making of a picture, there is a contractual relationship. Sometimes a company like Paramount would invest $4 million in a movie. That movie will be made by an independent producer. Now, in the contract, Paramount certainly has a right to provide that it shall have a veto power on the people who are employed because it is investing its money in that picture and if it turns out that a person who is employed in that picture is harmful to the picture, it means Paramount would endanger the money that it has invested in it. But that is all a private contractual matter; there is no concert of action at all. * * * Would it mean that if Twentieth Century-Fox invests $4 million with an independent producer to produce a picture that it could have nothing to say about who is going to work on that picture? If that were the case, it would be very difficult for these independents to get financing. That is the way the financing is done in a lot of these pictures these days" (J.A. 561-562).

in a reasonable manner" (J.A. 568) means that the District Court found that respondents' joint policy of November 4, 1960 (Ex. 31; J.A. 233), which left each respondent free to determine how it should be applied, was individual, not concerted, action.[2] This is a question of law. Even assuming that the November 4, 1960 policy is not concerted action as between respondents at the *producer* level, when that policy and respondents' distribution-financing agreements with independent producers are read together (Pet. 11, ftn. 15), each respondent, whether acting independently or in concert with any other respondent at the *distributor* level, is actually restraining competition between all "independents" on the producer level who finance and distribute through that respondent. This is concerted action and illegal, *per se*. *Radiant Burners* v. *Peoples Gas & Coke Co.*, 364 U. S. 656 (1961).

The court below ignored this rule and did not reach the question of "reasonableness" because of its reliance on the District Court's subsidiary findings,[3] *i.e.*, findings wholly unresponsive to the factual situation existing as of the date of the "hearing" before the District Court (Pet. 21-22). Because of the nature of this error, Question 1 presents "a question of law, namely whether the [courts below] applied the proper standard to essentially undisputed facts." *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). This issue was fully briefed and argued below (Br. 23-31; Rep. Br. 16-17) and is squarely presented by Question 1 of Petitioners' Statement of Questions Presented (Pet. 2). Rule 23(1)(c) of the Rules of this Court provides that the "statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

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[2] See the treatment of this issue by the District Court on petitioners' motion under Rule 30(b) of the Federal Rules of Civil Procedure (28 FRD 2, 6; J.A. 516(14)).

[3] Findings 12, 13 and 14 (J.A. 568-569).

II

Respondents seek to defeat certiorari on the "findings" issue raised by Question 3(b) (Pet., 3) on the ground that the District Court's July 24, 1961 order (J.A. 564) was non-appealable and that petitioners' first Notice of Appeal, filed July 28, 1961 (J.A. 565) was, therefore, premature (Res. Br., 8-9).[3] While there is substantial question as to whether or not the action of the District Court on July 24, 1961 was appealable under 28 U. S. C. § 1292(a)(1)[4] respondents made no motion to dismiss the appeal in No. 16,523 and the Court of Appeals believed that the July 24, 1961 order (J.A. 564) was appealable. The court said: "We have before us consolidated appeals from *orders* of the United States District Court for the District of Columbia denying appellants' motion for preliminary injunction." (Pet. App. A, 27) (emphasis supplied). Had it believed otherwise, it would have dismissed the appeal in No. 16,523 on its own motion. *Trivette* v. *New York Life Ins. Co.* (6 Cir.), 270 F. 2d 198, 199. Accordingly, once a Notice of Appeal was filed on July 28, 1961 in Appeal No. 16,523, the District Court had no jurisdiction thereafter to entertain a motion under Rule 52(b). 5 Moore's *Federal Practice*, 2683-2684; 7 Moore's *Federal Practice*, 3158-3160, and cases cited.

Respondents assert that the record "is perfectly clear" that the District Court's findings were made in accordance with Rule 52(a) and that the opinion below, which stated that these findings were made in accordance with Rule 52 (b) was, obviously, "a typographical error" (Res. Br. 8, ftn.). Surely, since this very "error" was specifically called to the attention of the court below in the petition for re-hearing *en banc* (Pet. 15), it is reasonable to assume

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[4] Compare *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, 232-236 (1958) and *Bowles* v. *Rice* (6 Cir.), 152 F. 2d 543, 544.

that the petition would have been granted if only to correct it. Since the petition was denied (R. 605), it is plain that the Court of Appeals did not consider its holding on this issue to be an error—typographical or otherwise.

Conclusion

The courts below failed to apply proper legal standards to essentially undisputed facts and thereby frustrated private enforcement of the antitrust laws. Because of this, petitioners' ability to carry on this litigation has been effectively undermined with the result that, unless this Court acts now, consideration of the merits may be foreclosed.

In the courts below, petitioners' counsel stated during argument that if a preliminary injunction was refused, petitioners' complaint should be dismissed:

> "If the injunction is denied * * * and the * * * plaintiffs who are writers are once more excluded from this industry and if the Court does not issue an order from which I may effectively appeal, the defendants will have won their case. Now, they will have won it not on the merits; they will have won it simply because the plaintiffs will be unable financially to carry it on." (J.A. 555(1)).

The courts below ignored this plea and thereby side-stepped any consideration of the merits. This is in marked contrast to the recent attitude expressed by a majority of the court below in *Freeman* v. *Armour & Co.*, No. 952, this term.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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